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In The
Supreme Court of the United States
OCTOBER TERM 1952

No. 372

LEWIS H. RICE *et al.*,
Petitioners,

VERSUS

W. L. SAYERS *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OCTOBER, 1952.

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In The
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No.

LEWIS H. RICE; MOSS RICE; MAY E. SHAW; OLGA B. SHINNAMAN; VIOLET A. E. RICE; CHARLES B. RICE; SHELDON S. RICE; RUBY G. RICE; VERA M. MCARTHUR; AUDREY L. JOLLIFFE; LEAH M. RICE; ALLIE E. RICE; BURTON H. ELLYATT; CARRIE WETTLAUFER; GEORGE E. RICE; MARTHA E. FERGUSON; LENORA FREE; EDITH DOBSON; EMMA A. SMALL; EVA LINTON and MARY L. CHRYSLER,

Petitioners,

VERSUS

W. L. SAYERS, JAMES B. CAMERON, C. L. CUMMINGS, W. S. HEFFELFINGER and J. M. WELLS, Trustees of A. J. Rice Estate; ATCHISON COUNTY COMMUNITY HIGH SCHOOL of Effingham, Kansas; RURAL HIGH SCHOOL DISTRICT NO. 3, Hill City, Graham County, Kansas; THE KANSAS WESLEYAN UNIVERSITY, Salina, Kansas, and its Board of Trustees; and THE UNIVERSITY OF KANSAS, Lawrence, Kansas, and its Board of Regents,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The above named plaintiffs pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in this cause.

OPINIONS BELOW

The opinion of the District Court (R. 90) is reported in 98 F. Supp. 634. The opinion of the Court of Appeals (R. 183) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was announced on the 29th day of July, 1952. The jurisdiction of this Court is invoked under Section 1332 of the Revision of the Judicial Code, the same being Title 28 of the United States Code as enacted on the 25th day of June, 1948.

QUESTION PRESENTED

Whether a Federal District Court in a diversity of citizenship case with the requisite amount in controversy had jurisdiction of an action *in personam* brought by the heirs of a testator, which action was commenced after the probate administration of the last will and testament had been completed and was against Trustees named in the will, to determine their rights as heirs at law and beneficiaries under a resulting trust in the properties which had been held by the Trustees in purported testa-

mentary trusts, which testamentary trusts were void because they were in violation of public policy.

STATEMENT OF FACTS

The plaintiffs (petitioners herein) instituted the action in the District Court for the District of Kansas to establish their rights in the testator's properties held by the defendant trustees (R. 1 to 6). The defendant schools were granted leave by the District Court to intervene (R. 57) and they set up their separate claims.

A. J. Rice died a resident of Kansas in 1926. His last will and testament was admitted to probate in the probate court of Graham County, Kansas, immediately (R. 33). The entire gross estate of $211,000 (R. 34) was devised to the defendant trustees purportedly for the purpose of expounding in perpetuity in the defendant schools the testator's theories on health. With slight variations, the same testamentary directions applied to each of the four schools (R. 7 to 21). In general, the trust purposes revolved around his theories on the "natural laws of health" after the specific enumeration of which he then stated the general purpose of them as follows:

> "* * * it being the purpose of this bequest to demonstrate to future generations the utter uselessness of narcotics and drugs in all forms when taken internally and to prove the use of the same is not only unnecessary but is positively injurious to the human system and destructive of health and longevity" (R. 15).

He implemented his intentions by making it the mandatory duty of the trustees to withdraw payment of the funds "if there shall be a disposition on the part of the authorities of said Universities to use said funds for the purpose of promulgating a system of therapeutics requiring or sanctioning the use of narcotic drug medication * * *" (R. 18).

The estate was settled in the probate court and the executors turned over the properties to the trustees in 1929 (R. 34). Although the will provided for the conversion of the entire estate to cash (R. 20) such conversion has never taken place, nor has any money or property whatsoever been applied to the teaching of the testator's theories (R. 158).

The plaintiffs are all of the heirs at law, or descendants of the heirs at law, of the testator. They are all citizens of Canada with the exception of two who are residents and citizens of California (R. 2). In their Complaint they allege that the trusts are against public policy and void because they

(a) Establish and teach falsehoods,

(b) Establish and teach practices detrimental to public health,

(c) Violate the rules of law against perpetuities,

(d) Be impossible of administration in accordance with the terms, limitations, and compulsory conditions imposed by the testator,

(e) Be *ultra vires* to the statutory powers of the public agencies named by the testator,

(f) Would discourage medical and scientific research and development (R. 5).

They then prayed for a decree "that the defendants now hold the said trust assets on a resulting trust of which these plaintiffs are the beneficiaries and that these plaintiffs are entitled to have transferred to them both title and possession of all of the said trust assets" (R. 6).

The Court of Appeals for the Tenth Circuit held that the cause was within the exclusive jurisdiction of the probate courts of Kansas, and it ordered the cause dismissed (R. 183).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below that the District Court had no jurisdiction is contrary to the decisions of this Court and other courts of appeal.

Original jurisdiction is conferred by the Judicial Code, 28 U.S.C.A. 1332 (a), upon the District Courts of the United States in all civil actions where the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs and is between (1) citizens of different States, or (2) citizens of a State and citizens or subjects of a foreign State. The amount in controversy herein is many times over $3,000.00. The defendants are all citizens of the State of Kansas, and the plaintiffs are all citizens and subjects of Canada except two of whom are citizens of the State of California.

The court below adopted the view that the action was a probate matte rand cognizable only in the Probate Court of the State of Kansas. The basic error of the court below was that it regarded the proceeding as being *in rem* and in the nature of a will contest. It is clear from the record, however, that the action is one *in personam* against the trustees to determine the plaintiffs' rights in trust properties. It has none of the aspects of a will contest. The probate administration of the estate had long previously been completed and the executors discharged. The plaintiffs do not complain about the propriety of the last will and testament having been admitted to probate. No question is raised about the testamentary capacity of the testator nor about the instrument having complied with the formalities required under Kansas law for the execution and attestation of testamentary instruments. On the contrary, the entire proceedings assumes the validity of the probate of the instrument as the testator's last will and testament, and the plaintiffs merely ask the Court to determine what constitutes their rights in the properties that the testator purported to leave in trust under the will.

This Court has consistently confirmed the equity jurisdiction of the Federal Courts in actions *in personam* for the determination of the rights of plaintiffs to decedent's estates in diversity of citizenship cases with the requisite jurisdictional amount involved. The principle has been well established commencing with the case of

Waterman v. *Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 54 L. ed. 80. The most recent decision was in the case of *Markham* v. *Allen*, 326 U.S. 490, 90 L. ed. 256, in which this Court said:

> "It is true that a Federal Court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 * * * did not extend to probate matters. (Citing authorities.) But it has been established by a long series of decisions of this Court that Federal Courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the Federal Court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state courts."

In the leading case of *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, *supra*, an out of State claimant sought to have a judicial determination that a certain legacy had lapsed and that, as a result thereof, all interests in certain legacies and residual bequests devolved to her as next of kin. This Court confirmed the jurisdiction of the District Court and said in part:

> "The general rule to be deduced from them is that, inasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that, insofar as controversies between citizens of different states arise which are within the established equity jurisdiction of the Federal courts, which is like unto the high court of chancery in England at the time of the adoption of the judiciary Act of 1789 (1 Stat. at L. 73, chap. 20),

> the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate, and giving them jurisdiction over similar matters. This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs to establish their claims and have a proper execution of the trust as to them."

Illustrating the same principle are the decisions of this Court in *Commonwealth Trust Co.* v. *Bradford*, 297 U.S. 613, 80 L. ed. 920, and *Mandeville* v. *Canterbury*, 318 U.S. 47, 87 L. ed. 605.

Conversely, in any action in which an essential element involves the determination of a purely probate matter, the Federal courts do not exercise jurisdiction. If an issue is raised as to the testamentary capacity of the testator, or as to fraud, duress, etc., in procuring the execution of a last will and testament, such an issue is determined *in rem* in the proper probate court of the State and cannot be tried within the equity jurisdiction of the Federal courts. *Sutton* v. *English*, 246 U.S. 199, 62 L. ed. 664.

There are numerous decisions in the various courts of appeal illustrating the application of the rule. Amongst them are *Cottingham* v. *Hall*, (Fourth Circuit), 55 F. 2d 664; *Harrison* v. *Moncravie* (Eighth Circuit), 264 F. 776; *Kittredge* v. *Stevens* (First Circuit), 126 F. 2d 263; *Vacuum Oil Co.* v. *Land Title Guarantee & Trust Co.* (Sixth Circuit), 80 F. 2d 476.

The decision in the court below was, in fact, in conflict with its own prior decisions. In *Miami County National Bank* v. *Bancroft*, 121 F. 2d 921, the court had said:

> "Matters of purely probate character are not within the jurisdiction of the Federal courts (Citing authorities). The question here, however, is not one of probate, but is to determine the ownership of property and the right to share in the distribution thereof. It has been held by an unbroken line of decisions that where diversity of citizenship and the requisite jurisdictional amount are present, Federal courts have equity jurisdiciton to determine whether litigants are heirs of a decedent and their share in his estate. (Citing authorities.)
>
> "The jurisdiction of Federal courts in such matters is derived from the Federal Constitution and statutes and may not be restricted nor abridged by a state establishing probate courts and giving them exclusive jurisdiction over the settlement of estates of decedents * * *."

Almost identical language was again employed by the lower court in the case of *Rosenberg* v. *Baum*, 153 F. 2d 10. Both of these decisions arose in cases appealed from the District Court of Kansas, and both of them involve the same probate laws and jurisdiction as are involved in the present controversy.

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2. The decision of the court below is in conflict with applicable local statutes and decisions.

The court below adopted the view that an equitable action of this kind could under the laws of Kansas be

litigated only in the probate court as a probate matter. It apparently took this view as a result of some loose language in the Kansas decisions to the effect that any proceeding which involves the validity of testamentary provisions is a "will contest." The view of the court below, however, is in direct conflict with both statutes and decisions of the State of Kansas. Not only did the plaintiffs recognize the validity of the will as a testamentary instrument and the propriety of its probate administration, which had been completed years before but in fact the Probate Code of Kansas does not attempt to say that an equitable proceeding of this kind is a will contest. In the entire Code, neither the phrase "will contest" nor any comparable phrase appears a single time.

The Supreme Court of Kansas has always recognized the jurisdiction of its District Courts over trusts of all kinds and equitable proceedings relating thereto. The statutes of the State are explicit. Sec. 20-301 of the General Statutes provides that the District Court "shall have general original jurisdiction of all matters, both civil and criminal (not otherwise provided by law)." Sec. 60-3132a provides in part as follows:

> "In cases of express trust where doubtful meaning of the trust instrument is alleged, courts of record within the scope of their respective jurisdictions shall have power to make binding adjudications of rights, whether or not consequential relief is, or at the time could be, claimed. * * *"

The Probate Code itself, G.S. 59-301, confers jurisdiction upon the probate court. One of the statutory grants of jurisdiction is as follows:

> "(8) Of trusts and powers created by will admitted to probate, and of trusts and powers created by written instruments other than by wills in favor of persons subject to guardianship; to appoint and remove trustees for such trusts, to make all necessary orders relating to such trust estates, to direct and control the official acts of such trustees, and to settle their accounts: *but this provision shall not affect the jurisdiction of district courts in such cases.*" (Italics supplied.)

The Supreme Court of Kansas has not attempted to deny the equitable jurisdiction of the District Courts of Kansas over estates created by wills. This has been true even though such equitable jurisdiction had the effect of determining the invalidity of testamentary provisions. In *Beverlin* v. *First National Bank*, 151 Kan. 307, 98 P. 2d 200, a testator had devised his property to be held in trust for each of two daughters and thereafter for their respective children. The portion of the will in favor of the grandchildren was challenged on the ground that it violated the rule against perpetuities. Despite the fact that the action was brought within the equity jurisdiction of the State District Court, rather than in the probate court, the court held that the questioned testamentary provision was void and that the rights of the parties should be determined accordingly.

In *Allbert* v. *Allbert*, 148 Kan. 527, 83 P. 2d 795, an action was brought in the District Court to impress a resulting trust upon real estate held by a devisee under a will which had been admitted to probate, the claim having been based upon equitable rights of the parties against the testatrix who had willed the property to the defendant. Though it had the effect of completely circumventing the will, the court sustained the equitable jurisdiction of the District Court and impressed the trust upon the property.

It is true that various decisions of the Supreme Court of Kansas have contained sweeping statements to the effect that any proceeding which renders the provisions of a will nugatory, or contrary to the obvious intent of the testator, are will contest actions. The Kansas court then holds that under the Probate Laws of Kansas all such actions are triable in the probate courts.[1] The Kansas court itself, however, has repeatedly stated that these decisions do not affect the substantive rights of the litigants. For instance, it was said in *Axe* v. *Wilson*, 150 Kan. 794, 96 P. 2d 880:

> "It should be borne in mind these decisions deny plaintiff no legal right, but simply determine her remedy."

These petitioners, plaintiffs in the case below, have under the laws of Kansas a substantive right to the prop-

[1] *Asendorf* v. *Edwards*, 162 Kan. 310, 176 P. 2d 535, 538; *Foss* v. *Wiles*, 155 Kan. 262, 124 P. 2d 438, 444; *Yeager* v. *Yeager*, 155 Kan. 734, 129 P. 2d 242, 243; *In re: Grindrod's Estate*, 158 Kan. 345, 148 P. 2d 278, 282.

erties held in the trust. Examples of comparable substantive rights being protected are contained in *Shannep* v. *Strong*, 160 Kan. 206, 160 P. 2d 683, and also *In re: Estate of Weeks*, 154 Kan. 103, 114 P. 2d 857.

If the substantive rights of the plaintiffs are to be recognized, no decisions of the Kansas courts saying that the remedy for the enforcement of such substantive rights is by a proceeding in the probate court could have the effect of converting an equitable action *in personam* into a probate proceeding *in rem* or ousting the Federal courts of their equity jurisdiction to determine the plaintiffs' rights in the property. As was stated by this Court in *Guarantee Trust Co.* v. *York*, 326 U.S. 99, 89 L. ed. 2079:

> "State law cannot define the remedies which a Federal court must give simply because a Federal court in diversity jurisdiction is available as an alternative tribunal to the state courts. Contrariwise, a Federal court may afford an equitable remedy for a substantive right recognized by a State even though a state court cannot give it."

A clear application of the same principle was involved in *Spencer* v. *Watkins*, 169 F. 279 (certiorari denied 215 U.S. 605, 54 L. ed. 346), in which the facts were closely analogous to the case at Bar and in which the Court said:

> "Jurisdiction over the probating of wills and the granting of administrations, which was formerly in the ancient ecclesiastical courts of England, has fallen to the modern probate courts, where, generally speaking, it is exclusively exercised. In some states, as in Minnesota, the statutes have added much that

was formerly cognizable in the form of ordinary suits at law or in equity in courts of general jurisdiction; but it is manifest that in doing so they are dealing with that which may also be subject to the judicial power of the United States. Statutes of that character may very properly regulate the jurisdiction of the courts of the states, but they cannot restrict that of the courts of the United States. *Security Trust Co.* v. *Bank*, 187 U.S. 211, 227, 23 Sup. Ct. 52, 47 L. Ed. 147.

"We think that a controversy like that before us is not one strictly pertaining to probate and administration, but, on the contrary, has every element of a plenary suit *inter partes*, and that it belongs to a class of which the English courts of chancery were accustomed to take cognizance as involving the execution of trusts. 3 Pomeroy's Eq. Juris., #1127. The suit of the heirs was not a will contest in the customary acceptation of that phrase. No question was involved that would properly arise at the presentation of a will for admission to probate. The heirs did not seek to annul the probate of the will in question. They did not challenge the testamentary capacity of the testatrix or the sufficiency as to authentication or form of the written expression of her testamentary purposes. On the contrary, it was averred in their bill of complaint and admitted in the answer that the instruments in question had been duly admitted to probate as the last will and testament of the deceased, and that letters testamentary had been duly issued to the defendant executors * * * The suit was brought after the ordinary matters incident to probate and administration had been fully disposed of and when final distribution was at hand, and its object was to have the bequest of the residuary estate declared contrary to the laws of the state relating to the disposition of property for charitable purposes, and to secure for the complaining heirs their respective shares thereof upon the ground that the deceased had died intestate as to the estate

in question * * * This was a civil suit in equity, within the jurisdiction of the Circuit Court. It should be added that in purpose and effect it no more interfered with the probate court in its rightful custody of the estate than would an ordinary action and judgment at law in the Circuit Court establishing a claim or demand on contract."

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3. The question involved is of vital importance in matters of public policy pertaining to health and education.

The issue of the jurisdiction of the Federal courts in this and comparable cases is of vital importance in the entire field of equity jurisprudence as administered through the Federal courts. If substantive rights that have traditionally been protected by equitable remedies in the Federal courts are now to be regarded strictly as probate matters to be determined only through *in rem* proceedings in the probate courts, great mischief will have been done to the rights of claimants to such estates. The historic concept of the power of an equity court to determine the rights of the parties in testamentary trusts would be annihilated.

The instant case is an excellent example of the havoc of such a departure from traditional fields of equity jurisdiction. The testator's will (R. 6-21, inc.) attempted to establish trusts plainly violative of the public policy of every civilized country. The provisions which attempted to set up a trust in perpetuity "to demonstrate to future generations the utter uselessness of narcotics and

drugs in all forms when taken internally" (R. 15) are obviously in conflict with all principles of scholastic and scientific progress and, if applied in actual practice, would be disastrous to the health of the nation. Of these provisions, the noted medical authority, DR. A. C. IVY, testified:

> "The prevalence or acceptance of such a doctrine would be tragic in the United States today" (R. 132).

Yet, if the holdings of the lower court were correct, regardless of how flagrantly such a trust violated the laws or public policy of a State, the heirs at law of the testator who established it would be barred from going into a court of equity jurisdiction to determine their rights through remedies that have been within the purview of equity jurisdiction in comparable situations in the entire history of our jurisprudence.

The mischief is compounded by the fact that the holding of the lower court would deny access to the Federal courts for the protection of such rights for citizens of a foreign country as in the case at Bar. The lower court would compel them to litigate such vital questions of public policy and principles of equity within the infirmities of probate court administration and jurisdicton.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this Petition should be granted.

Respectfully submitted,

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OCTOBER, 1952.